

E-filed 2/8/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

INTERNATIONAL ALLIED PRINTING
TRADES ASSOCIATION; NORTHERN
CALIFORNIA ALLIED PRINTING TRADES
COUNCIL, an agent of the International Allied
Printing Trades Association,

Case No. C05-02947 HRL

**ORDER DENYING PLAINTIFFS'
MOTION FOR RELIEF FROM
VOLUNTARY DISMISSAL**

Plaintiffs,

v.

AMERICAN LITHOGRAPHERS, INC.,

Defendant.

I. Introduction

International Allied Printing Trades Association and Northern California Allied Printing Trades Council (jointly, "plaintiffs") move this court pursuant to Fed. R. Civ. P. 60(b) for relief from a stipulated voluntary dismissal. Defendant American Lithographers opposes the motion. Based on the papers submitted and the arguments of counsel at the February 7, 2006 hearing, the court issues the following order.

II. Background

Several months into this trademark infringement case, defendant extended a settlement offer to plaintiffs by letter to plaintiffs' counsel. The letter stated:

In the spirit of resolving all outstanding matters between our clients, American Lithographers is willing to withdraw the Unfair Labor Practices Charge it filed with the National Labor Relations Board (designated as Case No. 32-CB-5974-1) with prejudice if you will dismiss with prejudice the Complaint you filed against it in the United States District Court.

1 See Rediger Decl. in Support of Defendant's Opp., Ex. 1. Plaintiffs' counsel responded by letter
 2 that he would discuss the offer with his clients. See *id.* at Ex. 2. Then, on November 4, 2005,
 3 plaintiffs' counsel wrote the following: "This will confirm that I have been authorized, pursuant
 4 to your earlier offers, now that the NLRB case has been withdrawn, to stipulate the dismissal of
 5 this matter. Please draw up an appropriate Stipulation to Dismiss." See *id.* at Ex. 3.

6 On November 10, 2005, through the court's e-filing system, plaintiffs' counsel filed a
 7 "Stipulation of Dismissal of Entire Action with Prejudice Against Defendant American
 8 Lithographers, Inc. Pursuant to Federal Rule of Civil Procedure 41(a)(1)." Counsel also filed a
 9 "Proposed Order for the Dismissal of Entire Action with Prejudice" for the court to execute.
 10 Because plaintiffs' filing under Fed. R. Civ. P. 41(a)(1) operated to dismiss the suit, no further
 11 action was required by the court to effectuate the parties' agreement, and the clerk closed the
 12 file.

13 Plaintiffs now move the court for relief from the voluntary dismissal pursuant to Fed. R.
 14 Civ. P. 60(b)(1). They claim that plaintiffs' counsel intended that the matter would be dismissed
 15 *without* prejudice, and his signing and filing of a stipulation stating otherwise was an error
 16 constituting "excusable neglect" within the meaning of the Rule.¹

17 **III. Legal Standard**

18 Federal Rule of Civil Procedure 60(b) provides, in part: "On motion and upon such
 19 terms as are just, the court may relieve a party or a party's legal representative from a final
 20 judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or
 21 excusable neglect."

22 There is no per se rule governing what constitutes "mistake, inadvertence, surprise, or
 23 excusable neglect" and district courts are instructed to take into account all the circumstances
 24 surrounding a party's act or omission. See *Pioneer Investment Services v. Brunswick*
 25 *Associates*, 507 U.S. 380, 395 (1993) (analyzing the term "excusable neglect" in the context of
 26

27
 28 ¹At the hearing on this motion, plaintiffs' counsel suggested that rather than a "clerical error" as they
 represented in their moving papers, this was a "miscommunication" or "failure of the 'meeting of the minds.'"

Fed. R. Bankr. P. 9006(b)); *see also Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (analyzing the term "excusable neglect" in the context of Fed. R. Civ. P. 4(a)(1)(A)).²

IV. Discussion

The question presented here is whether this court should exercise its discretion under Rule 60(b) and convert the stipulation of dismissal with prejudice to one without.³ Plaintiffs insist that its mistake was due to a "miscommunication." However, the facts of this case suggest otherwise. Defendant's initial settlement offer letter *and* the stipulation signed by plaintiffs' counsel clearly indicated that the dismissal was "with prejudice." Defendant represents that this is exactly the result it intended when it made the offer. If there was any "miscommunication," it was a result of plaintiffs' counsel's carelessness. Plaintiffs' counsel apparently failed to read not only the stipulation, but also defendant's correspondence. And, although counsel did not draft the stipulation himself, he [or someone under his supervision] did draft the proposed order filed therewith, and he [or someone under his supervision] explicitly included the term "with prejudice" when titling both documents for the purpose of filing them in the court's e-filing system. This is not a case of a "typo" or even a missed filing deadline, which the court might readily categorize as "mistake" or "excusable neglect," but rather a pattern of inattentiveness on the part of plaintiffs' counsel. In *Pincay*, the Ninth Circuit noted that "a

²Prior to the *Pincay* decision, the Ninth Circuit consistently held that attorney error such as the one in this case was an insufficient grounds for relief under Rule 60(b)(1). *See, e.g., Allmerica Financial Life Ins. and Annuity v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1998) (upholding the lower court's decision that counsel's failure to plead an affirmative defense did not constitute excusable neglect); *United States of America ex rel. Familian Northwest v. RG & B Contractors*, 21 F.3d 953, 956 (9th Cir. 1994) (upholding the lower court's decision that a company's failure to include some invoices when calculating damages did not constitute excusable neglect even though it resulted in a lesser judgment); *Engleson v. Burlington Northern Railroad*, 972 F.2d 1038, 1043-44 (9th Cir. 1992) (upholding a lower court's decision that counsel's failure to plead the correct jurisdiction statute was not excusable neglect). The *Pincay* court did not specifically repudiate these holdings. Rather, it determined that a per se rule is not appropriate when evaluating whether an omission or mistake constitutes "excusable neglect," and held that such a determination should be left to the sound discretion of the district court evaluating the circumstances of each particular case. *Pincay*, 389 F.3d at 859-60.

³There is a threshold issue here that neither party raised in its papers or at the hearing. Under Rule 60(b), a court may relieve a party from a "final judgment, order, or proceeding." It is not entirely clear that a voluntary dismissal under Rule 41(a)(1) fits into one of these categories. There is only thin authority among courts in this district and circuit on this issue. *See, e.g., Noland v. Flohr Metal Fabricators*, 104 F.R.D. 83, 85 (D. Alaska 1984) (holding that despite the lack of court intervention, a voluntary dismissal under Rule 41(a)(1) can be considered a "proceeding" for purposes of Rule 60(b)). Because in some circumstances leaving intact a voluntary dismissal could produce an unjust result, this court agrees with *Noland* that Rule 60(b) relief may sometimes be appropriate in cases of voluntary dismissal.

1 lawyer's failure to read an applicable rule is one of the least compelling excuses that can be
2 offered." *Pincay*, 389 F.3d at 859. Even less compelling is an attorney's failure to read
3 essential documents he himself signs and files.

4 The court must also consider the potential prejudice that would result from vacating the
5 voluntary dismissal. Defendant has already dismissed the NLRB claims against plaintiffs, as
6 promised.⁴ If the court altered the dismissal with prejudice as plaintiffs request (an outcome
7 that defendant did not agree to), plaintiffs could renege on their part of the bargain and
8 defendant would have little or no recourse. Plaintiffs would essentially get to "have their cake
9 and eat it too"—the benefit of the NLRB dismissal *and* the ability to refile the district court
10 claims. Such an outcome would prejudice defendant.

11 On the other hand, plaintiffs offer no facts suggesting that they will be harmed if the
12 dismissal with prejudice is left intact. They acknowledge that defendant has held up its end of
13 the agreement. And, since plaintiffs express no interest in trying their claims on their merits,
14 they have not been deprived of their opportunity for a trial on the merits as in the *Noland* case
15 they rely on. *See Noland*, 104 F.R.D. at 87. Moreover, if defendant in the future should again
16 engage in the same alleged trademark infringement, plaintiffs can simply file new claims based
17 on the new conduct. Overall, plaintiffs have provided the court with no reason why the
18 dismissal with prejudice will produce an unjust result in this case.

19 **V. Conclusion**

20 This case does not present facts that compel the court to act pursuant to Rule 60(b).
21 Accordingly, plaintiffs' motion for relief from the voluntary dismissal is denied.

22 **IT IS SO ORDERED.**

23 Dated: 2/8/06

24 /s/ Howard R. Lloyd
25 HOWARD R. LLOYD
26 UNITED STATES MAGISTRATE JUDGE

27 _____
28 ⁴No evidence has been provided to the court verifying whether the dismissal was with or without
prejudice. However, the parties represent that the six-month statute of limitations for the NLRB claims will
expire this month.

1 This notice will be electronically mailed to:

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6 Counsel are responsible for distributing copies of this document to co-counsel who have
7 not registered for e-filing under the court's CM/ECF program.

8 Dated: 2/8/06

RNR

Chambers of Magistrate Judge Lloyd